FILED
OCT 18 1982
ALEXANDER L. STEVAS,
CLERK

NO. 82-685

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

CHARLES S. CONLEY,

Petitioner,

versus

CITY OF MONTGOMERY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

PETITION FOR WRIT OF CERTIORARI

CHARLES S. CONLEY,
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Pro Se

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QUESTIONS PRESENTED

I

Whether a State highest Court may deny or frustrate the exercising of rights and immunities guaranteed by the Fourteenth Amendment to the Constitution of the United States, involving the protection of vested property rights, by asserting that an Appellant failed to raise in the trial court, the Federal Constitutional question presented on Appeal, where the trial record reveals to the contrary, that Petitioner had raised and asserted in the trial court the Federal Constitutional question as presented on Appeal?

II

Whether the judgment of a State Supreme Court should be reversed, where the trial record submitted on Appeal reveals improper conduct on the part of the trial court, in violation of a Petitioner's rights of Constitutional due process and denial of rights of equal protection as guaranteed by the Fourteenth Amendment to the Constitution of the United States and where it further appears that said Appellant Court obviously may have neglected or refused to read or construe the trial transcript and record submitted to it on Appeal?

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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

CHARLES S. CONLEY,

Petitioner,

vs.

CITY OF MONTGOMERY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE ALABAMA SUPREME COURT

The Petitioner, CHARLES S. CONLEY respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Alabama Supreme Court entered in this proceedings on April 23, 1982.

OPINION BELOW

The opinion of the Supreme Court of Alabama in Conley v. City of Montgomery, is reported at . . . . Ala. . . . . So. 2d . . . . and is set forth in Appendix B, infra., pp. A-16–A-21. The Order and the Amendment to Order of the Circuit Court of Montgomery County, Alabama are printed in Appendix A, infra., pp. A-1–A-15.

JURISDICTION

The judgment of the Supreme Court of Alabama was entered on April 23, 1982, and Petitioner's application for Rehearing was overruled on May 21, 1982. The jurisdiction of this Court is based on 28 U.S.C. Section 1257(3), Petitioner having alleged below, and alleged herein the denial of due process, deprivation of rights, and immunities secured by the Constitution and Statutes of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES
AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

UNITED STATES CODE, TITLE 42
Section 1983

Civil action for deprivation of rights.

Every person who, under color or any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured

by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proceeding for redress. (R. S. Section 1979)

UNITED STATES CODE, TITLE 42
Section 1985(3)

Depriving persons of rights and privileges.

If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises or another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; . . . in any case of conspiracy set forth in this section, if one or more persons engaged therein do or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property or deprived of having and exercising any rights or privileges of a citizen of the United States, the party so injured may have an action for the recovery of damages, occasioned by such injury or deprivation against any one or more of the conspirators. (R. S. Section 1980)

STATEMENT OF THE CASE

On March 31, 1977, Petitioner, a black lawyer, purchased by Warranty Deed, twenty duplex houses, consisting of forty low rent apartments, all located adjacent to each other on the South side of Hardaway Street, in the City of Montgomery, Alabama, near the Alabama State University Campus. Said structures were occupied by poor "black" tenants for some forty years, prior to the purchase by the Petitioner.

The property involved herein, had been owned by a

wealthy white family for more than forty years.

For several years, Respondents admitted, at the trial that the prior white owners were permitted the privilege of making periodic repairs. However, immediately after Petitioner purchased the property, the Respondents, through its Director of Housing and Code Enforcement, who admitted on cross examination that he did not personally own any rental real property himself (Tr. 217, 403), commenced on a program of constant harassment of Petitioner and ordered Petitioner to make all mandated repairs to 38 of the 40 apartments in question and refused to allow Petitioner an opportunity to make repairs, house by house, as had been extended to the former white owners, which Respondents admitted at the trial. Several of the structures were in good condition requiring no repairs, at the time.

Obsessed by obvious hatred and bias, Respondents' persistent actions indicated a determination to bulldoze Petitioner's property inspite of comprehensive repairs made by Petitioner, before and after the actions, in question, were commenced by the Respondents. At the trial, Respondents admittedly directed its employees, on repeated occasions, to break into various apartments, purportedly to make inspection, without requesting, at any time, the permission of the Petitioner or his tenants to inspect, in violation of the Petitioner's vested rights and immunities as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

Respondents' Director of Housing and Code Enforcement testified that permission of the owner was totally unnecessary because of the Housing Ordinance of the City of Montgomery, No. 49-63, Section 16.1 which purportedly provided specific authority to him as the Director of the

Housing and Code Enforcement Division or any of his inspectors, ". . . to go into any house in the City of Montgomery. . ." without the owners' permission. (See Appendix C, *infra* p. A-22, A-23)

The trial record reveals that the Respondents repeatedly entered upon Petitioner's property through windows or locked doors, which were broken into, on the presumed authority that the Respondents possessed ample authority to do so, without seeking permission from the owner as to vacant apartments, even though the Director was personally acquainted with Petitioner.

From 1977 to 1981, Respondents continued to send its inspectors in groups of three or four persons, at a time, upon Petitioner's property without ever requesting Petitioner's permission to inspect. Respondents' sole witness, the Director of Housing and Code Enforcement testified that he felt like he, the Director, ". . . ought to rent. . ." one of the Petitioner's apartments, having made himself, many frequent excusions upon Petitioner's property. The Respondents' unannounced visits to Petitioner's tenants residents resulted in many of Petitioner's tenants moving because of the invasion of their privacy and the constant harassment of them by the Respondents.

Of the 20 dwellings owned by Petitioner, Respondents filed nineteen (19) separate Complaints, which alleged falsely under oath that *each* of Petitioner's houses were in a condition of collapse, open to transient and children, and constituting a fire hazard to adjoining property, even though many of the said structures were occupied by tenants, holding Leases to said property. Each of the buildings in question, were generally structurally sound, according to

testimony offered at the trial by Petitioner's witness, with the sole exception on one building.

Federal Constitutional Questions and evidence of the harassment by Respondents was presented at the trial. Petitioner testified that the Respondents, without notice, oral or written, to him instructed an independent contractor to cut several back yards at a cost of $1,223.50. Thereafter, Respondents directed the Tax Collector of Montgomery County, Alabama to collect or to place as a tax lien, said amounts against Petitioner's property, which Montgomery County Tax Collector now seeks to collect.

Pursuant to Respondents' request the trial court established a schedule of repairs designedly in a manner so as to deny and prohibit Petitioner from making repairs, himself, as is evident from the final judgment of the Circuit Court. (See Appendix A, *infra* p. A-1–A-15)

Said repair schedule was later amended by the trial court, which by design further restricted and limited the trial court's earlier order by establishing a modified time schedule for all repairs, and which selected various houses at different ends of said Street, intermittently until supposedly all 38 apartments were to be repaired in a manner mandated by the trial judge.

Respondents' continuous harassments in violation of Petitioner's rights as guaranteed by the Fourteenth Amendment included, inter alia, the following:

1) Constant and persistent trespasses upon Petitioner's property, which resulted in frequent vacanies by tenants who objected to Respondents' inspectors, daily presence. (Tr. 296, 355, 402)

2) The making of inside inspections and excessive interrogation of Petitioner's tenants, concerning the names, ages, and occupation of the occupants. (Tr. 297)

3) Causing $1,223.50 to be assessed against Petitioner's property as a result of employing an independent contractor to cut weeds on vacant lots, as well as lots Leased to tenants in occupancy, without prior notice, of any kind to Petitioner as the owner. The amount contrived by Respondents, being excessive and in violation of Petitioner's rights of due process. (Tr. 301, 517)

4) The sending of some forty (40) registered letters to Petitioner demanding repairs to be completed within sixty days.

5) Advising the Circuit Court of Montgomery County, Alabama to violate Petitioner's rights of due process by requesting a supersedeas bond in the amount of $125,000.00 as a condition of stay pending the Appeal of the Alabama Supreme Court.

6) Causing "verified" Complaints to be filed against Petitioner, which included patently false allegations, which Respondents, through its employees and attorneys knew to be false. (Tr. 240, 244, 246, 256, 260, 262, 263, 499)

7) Authorizing a private firm, motivated by the possibility of lucrative fees to be charged to the Petitioner to file nineteen (19) separate actions based on false allegations. (Tr. 482, 485, 496)

8) Requiring the Circuit Court of Montgomery County to appoint sixteen (16) separate Guardian ad Litems,

(Tr. 306) at Petitioner's expense, at a time when Respondents and their attorneys had personal knowledge that Petitioner was the exclusive owner in fee simple absolute as verified by a recorded Deed on file in the Office of the Judge of Probate of Montgomery County, Alabama. (Tr. 247, 250, 251, 486, 492)

9) Respondents' act of unequal enforcement of its Housing and Code Enforcement laws of the City of Montgomery based on personal friendship, acquaintance or race to the detriment of Petitioner, which amounted to invidious discrimination in violation of Petitioner's Constitutional rights to equal protection.

10) Advising the Court to establish a time table for repairs designedly inadequate and insufficient to make the numerous repairs directed by Respondents.

11) Falsely testifying and minimumizing the extent of the repairs which Petitioner had made to the property in question during the trial.

Petitioner argued in the Brief to the Alabama Supreme Court (a) that the trial court committed reversible error, when it failed to rule upon Respondents' illegal entry upon Petitioner's property, and (b) that Respondents misinterpreted the requirements of the Uniform Minimum Housing Code of the City of Montgomery, Ordinance No. 49-63, Section 16.1, which resulted in illegal entries on Petitioner's property in violation of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

An analysis of the conduct of the trial court, as revealed by the judgment and the trial record reveals the existence of

bias and prejudice of which Petitioner complained. The trial court ignored all testimony presented by the Petitioner and his witness because the Petitioner and his witness were members of the Negro race. Petitioner argued on Brief to the Alabama Supreme Court that the trial court believed the testimony as offered by Respondents because its witness was a member of the Caucasion race.

The Alabama Supreme Court, after denying oral argument, agreed that the trial court had established a reasonable time table in order to make repairs, even though the trial court failed to specify a single repair, which in its judgment was necessary.

Affirmance by the Alabama Supreme Court of the trial court's findings resulted in an approval of the double standards adopted by the City which resulted in invidious discrimination against Petitioner because of his race.

The Alabama Supreme Court (Appendix B, *infra* p. A-16–A-21) misread the record in this cause when it stated the following:

> "The record, . . . reveals that Complaints were received from tenants and neighbors, . . . as to the conditions of the property." (Tr. 214, 254, 255)

To the contrary, a painstaking search, totally and unequivocally, reveals that there is not one statement revealing the name of a single tenant or the name of a single neighbor who had complained of the condition of Petitioner's property as the Court opined. (Tr. 214, 254, 255, 256)

Unfortunately, the Alabama Supreme Court was im-

pressed apparently by the false and mendacious statement of one of the sellers of the property, whose intelligence and competence can be judged by the quality of his testimony which the record clearly reveals. Said witness volunteered to appear because of his bitterness over the sale of the property in 1977, which by 1982 had increased in value almost severalfold.

The Alabama Supreme Court's conclusion in this regard is remiss when it assumed that Petitioner bought the property in question at a time when said property was "almost unfit for human habitation," as surmissed by the Respondents' witness, then the Director of the Housing and Code Enforcement Division of the City of Montgomery.

If, indeed, said property was unfit for human habitation, allowing only a few weeks to literally rebuild said property was grossly inadequate, as set by the trial court.

On October 9, 1981, Petitioner sought to Stay the trial court's order on the grounds that the supersedeas bond in the amount of $125,000.00 was grossly excessive and prohibitive.

Another panel of the Alabama Supreme Court entered an Order on October 28, 1981, which states in part as follows:

> "The City of Montgomery on October 23, 1981 filed a response to the Motion for Stay of execution. On examination thereof, the Court has concluded that the City of Montgomery has not satisfactory shown to this Court why there should be a supersedeas bond in the amount of $125,000.00 and further, the City of Montgomery has not

shown to this Court why the judgment appealed from should not be stayed pending an Appeal in this Case."

Said panel stayed, without bond pending further Order of the Court.

REASON FOR GRANTING THE WRIT

This Petition presents two serious and substantial issues involving a denial of Petitioner's rights to an equal protection of the laws and a denial of Petitioner's rights of Constitutional due process by virtue of the affirmance of the trial court's decision by the Alabama Supreme Court, in violation of the Fourteenth Amendment to the Constitution of the United States amounting to reversible error.

Federal Constitutional issues were timely raised during the trial showing that Respondents' agents or employees had specifically conspired to violate Petitioner's Fourteenth Amendment rights by virtue of their repeated acts of harassment, which were admitted at the trial. The trial court was advised by the Petitioner, at the beginning of the trial of the Constitutional issues by the following statement:

> "I would also like to indicate that there appears to have been a conspiracy. There appears to be a lot of people who have been engaged in the conspiracy." (Tr. 186)

* * *

> "The City has engaged in acts of harassment and I am of the opinion that they have violated Federal and State Constitutional rights which I have. Also, they have violated specifically, and I would like to quote the Federal Statutes which they have violated, as

> 42 United States Code, Section 1983, and 42 United States Code, Section 1985, and Your Honor, I believe this Court is under a duty to protect, not only the violation of State rights, but also the violation of Federal rights. (Tr. 187)
>
> * * *
>
> "Your Honor . . . there are some serious problems with regards to the denial of Constitutional due process with regards to the immediate setting of this case without even having sent Counsel written notice, and on two days notice, the amount of time we feel is insufficient and clearly violated the Fourteenth Amendment to the Constitution of the United States." (Tr. 187-188)
>
> "The Court: All right sir. Your Motion to dismiss is denied. Your renewed Motion for continuance is denied. The case was set yesterday, as you know, so you've enjoyed a twenty-four hour delay." (Tr. 188).

Likewise, the Alabama Supreme Court, as the Court of last resort in the Alabama Court system committed reversible error when it effectively closed the door to any consideration of the Federal Constitutional issues raised by the Petitioner to the effect that Respondents had denied Petitioner's rights against harassment in violation of Federal Statutes cited by Petitioner as indicated above.

Speaking for an unanimous Court, Mr. Justice Vinson said in *Young v. Ragen,* 337, U.S. 235, 69 S. Ct. 235, (1949):

> "Of course, we do not review decisions which rest upon adequate non-federal grounds, and of course Illinois may choose the procedure it

> deems appropriate for the vindication of federal rights. . . . But it is not simply a question of State procedure when a State Court of last resort closes the door to any consideration of a claim of denial of a federal right."

Petitioner was amazed to note the final paragraph of the Alabama Supreme Court's opinion which is inconsistent with the record regarding the fact that Petitioner had raised Federal Constitutional issues in the trial court by the following reference:

> "Defendant raises other issues which he claims present Constitutional question. The record fails to discuss that such questions were presented to the Court below; therefore, we cannot address them."

Clearly the Court, undoubtedly, neglected to read, pages 187 and 188 of the trial court's transcript, which shows that the Federal Constitutional questions herein presented were raised in the trial court. Specific questions involving Petitioner's rights of due process and the fact of harassment by the Respondents, City of Montgomery as indicated above. During the course of the trial, Petitioner informed the trial court that it was under a duty to protect Petitioner in the exercise of his state as well as Federal Constitutional rights.

May a State Supreme Court, by a recital of an alleged fact, involving a case on Appeal, as a matter of Constitutional rights, ignore the trial record before it, which results in effectively depriving a person of rights protected by the Constitution and Statutes of the United States?

Having admitted that Petitioner raised on Brief in the Alabama Supreme Court Federal Constitutional issues, the Alabama Supreme Court was under a study to carefully scrutinize the record before it in order to determine what Constitutional issues if any, had been raised in the trial court.

Respondents admitted in the record (Tr. 276, 281, 291, 367, 370) that the former white owners were given the right to make periodic repairs. However, as to Petitioner, a different rule was invoked regarding the making of repairs to the same property. (Tr. 382, 284, 409)

The Constitution prohibits discrimination by States was announced in *Ex Parte Virginia*, 100 U.S. 339; *Strouder v. West Virginia*, 100 U. S. 303 (1879); *Garner v. Louisiana*, 368 U. S. 157 (1961) and *Thompson v. City of Louisville, et. al.*, 362, U. S. 199.

The Court has repeatedly stated that the law is clear that such discrimination based on race or color is equally repugnant. Whether it takes the form of legislation or unequal administration of the law by public authority. *Henderson v. Mayor of New York*, 92 U. S. 259 and *Mooney v. Holohan*, 294 U. S. 103, at page 113,

In *Rogers v. Alabama*, 192 U. S. 226, at p. 230, this Court stated at p. 230 the following:

> "It is a necessary and well settled rule that the exercise of jurisdiction by this Court to protect Constitutional rights cannot be declined when it is plain that the result of a decision is to deny the rights."

In *Lambert v. California*, 355 U. S. 225, 228, 78 S. Ct. 240, 243, this Court specifically states:

> "Notice is required before property interests are disturbed before assessments are made, before penalties are assessed. Notice is required in a myraid of situations where a penalty of forfeiture might be suffered for a mere failure to act."

Petitioner testified that Respondents had caused persons to go upon the property involved herein and cut weeds on both Leased and Non-Leased property, to which Respondents had failed to give Petitioner notice when it ordered independent parties to render certain services to be charged against Petitioner. (Trial transcript page 517)

Seeking to determine why the Respondents had failed to provide notice to Petitioner of their intended actions involving the cutting of weeds, the Respondents, through their Director of Housing and Code Enforcement, upon cross-examination, claimed for the first time that certified letters had in fact been sent to the Petitioner regarding their intended actions and further that Respondents had a copy of Petitioner's signature to verify that Petitioner had received proper notice. Upon further questioning, Respondents' witness admitted that he did not have a copy of a return receipt with the information which he claimed to have in his possession. Said witness was not questioned on re-direct on this matter, apparently, because said witness had stated that he did not have the names of Petitioner's agents, who allegedly accepted the notice of the postal record in proof of service.

Upon objection by Respondents regarding the cutting of weeds by the Respondents' agents, the trial court refused to permit further interrogation.

Likewise, the trial court, in violation of Petitioner's Constitutional right to reasonable notice of the trial, over Petitioner's objections, (trial transcript p. 188), said court scheduled the trial of the proceedings with only two days notice, by telephoning the Petitioner's secretary and without ever having sent Petitioner written notice.

Respondents actions were in violation of Petitioner's Constitutionally protected rights involving specific real property. The due process of law clause of the Fourteenth Amendment to the Federal Constitution provides that no state may deprive any person of property without due process of law. An opportunity for hearing is one of the essential elements of due process. *Synder v. Massachusetts*, 291 U. S. 97, 54 S. Ct. 330.

The Respondents, the City of Montgomery, failed to establish that notice of a hearing had been served on the Petitioner regarding the cutting of weeds by its agent at Petitioner's expense. Respondents offered no testimony or proof that notice had been given. In addition, Respondents neglected to cross-examine Petitioner on the matter.

This Court has held on numerous occasions that "the due process clause" of the Fourteenth Amendment to the Constitution of the United States makes, inoperative acts of an agency of Municipal government which fails to give notice and an opportunity to be heard to an owner of property before the issuance of an Order seeking the diminution or the destruction of vested property rights. *Milliken v. Meyer*, 311 U. S. 457; *Walker v. City of Hutchinson*, 352 U. S. 112, 77 S. Ct. 200; *Schroeder v. City of New York*, 371 U. S. 208; *Armstrong v. Manzo, etux*, 380 U. S. 545.

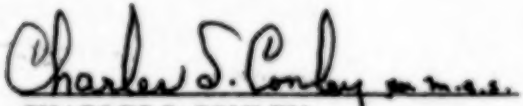
The Respondents failed to give notice of any kind to the

Petitioner and thereby ignored "an elementary and fundamental requirement of due process" in any proceedings seeking the destruction of Petitioner's property rights.

CONCLUSION

For the reasons indicated herein, a writ of certiorari should be issued to review the judgment and opinion of the Alabama Supreme Court.

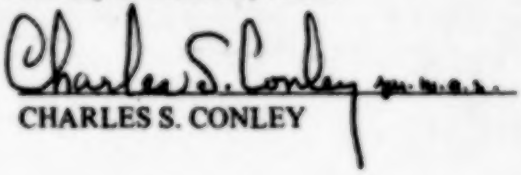
Respectfully submitted,



CHARLES S. CONLEY
Attorney for Petitioner

CERTIFICATE OF SERVICE

This is to certify that a copy of the above and foregoing Petition for Writ of Certiorari has been mailed, postage prepaid first class mail to Hon. Richard C. Belser, Post Office Box 1470, Montgomery, AL 36104, Attorney for Respondents, this 18th day of October, 1982.



CHARLES S. CONLEY

APPENDIX A

IN THE CIRCUIT COURT FOR
MONTGOMERY COUNTY, ALABAMA

CITY OF MONTGOMERY, ALABAMA,
a Municipal Corporation,

Plaintiff,

vs.

PERSONS HEREIN NAMED, IF ANY,
AND CERTAIN LANDS,

Defendants.

DOCKET NO.
CV-80-751
CV-80-753
CV-80-840
CV-80-841
CV-80-842
CV-80-844
CV-80-845
CV-80-846
CV-80-847
CV-80-848
CV-80-849
CV-80-850
CV-80-851
CV-80-853
CV-80-854
CV-80-855
CV-80-856
CV-80-754
CV-80-752

ORDER

These actions having been consolidated by Order of this Court dated June 19, 1980 come before the Court upon the pleadings filed by the parties of record and upon evidence taken by the Court ore tenus sitting without a jury.

Guardian Ad Litems were appointed by the Court but were discharged when the record established that there were no unknown parties. A Special Master was appointed by the Court to perform an independent review and inspection of the subject properties and report to the Court; said report was received by the Court and all parties of record on or about November 17, 1980.

The Court having considered the above finds that it has jurisdiction of these actions and further finds that the plaintiff is entitled to the following relief with regard to the specific properties involved herein:

FINDINGS OF FACT

The above actions were brought by the City of Montgomery, Alabama, a Municipal Corporation, to enjoin and abate public nuisances in accordance with Section 6-5-122 and 11-47-117-118, Code of Alabama, 1975.

The Court finds that each of the subject properties remain, in varying degrees, public nuisances and further finds that the City of Montgomery, Alabama, a Municipal Corporation, has legal authority to enjoin and abate such public nuisances.

The Court finds from the evidence that the Plaintiff has pursued the abatement of the public nuisance condition of the subject properties for several years and more specifically

has attempted to require the present property owner, Defendant Charles S. Conley, to remove or correct the public nuisance condition existing on each of the subject properties since 1978.

The Court finds from the evidence that the Plaintiff has made reasonable requests of the property owner, Conley, to remove the public nuisance conditions existing on the subject properties and has established reasonable time tables for the removal or correction of the public nuisance conditions existing thereon. The Court further finds, however, that the Defendant property owner, Conley, has failed, after notice, to comply with these time tables to bring the subject properties above public nuisance standards.

The Court finds from the evidence that the Plaintiff has not discriminated against either the subject properties or the owner of the subject properties in its application and enforcement of Sections 6-5-122 and 11-47-117 thru 118, Code of Alabama, 1975. While the evidence in these subject cases clearly demonstrate lack of discrimination by the Plaintiff, the Court, being familiar with numerous other proceedings, brought by the Plaintiff to abate public nuisances, takes judicial knowledge of the standard procedures employed by the Plaintiff and finds that these procedures were employed by the Plaintiff with regard to the subject properties and as concerns the subject property owner.

The Court finds from the evidence that some minor repairs have been made by the property owner, Conley, on some of the subject structures since the report of the Special Master but that each of the subject properties remain below public nuisance standards. However, since some of the subject properties have been partially improved, it is the opinion of this Court that equity requires that the property

owner be given the election of bringing the subject properties above public nuisance standards within a reasonable time table established by the Court or suffer the removal or razing of said structures by the Plaintiff.

The Court finds from the evidence that the standard procedures followed by the Plaintiff where a property owner elects to repair a structure which is a public nuisance is for the owner to obtain a building permit from the City, for the owner to notify the City upon completion of the repairs, and then for the City to conduct an inspection to verify whether the structure has been repaired above public nuisance standards. If the Defendant property owner elects to repair the subject structures within the time table set by the Court, the above procedures will be followed but, in addition, the Plaintiff will report its findings from final inspection to this Court.

If the City of Montgomery finds that the repairs have been satisfactorily completed to bring the property above public nuisance standards, the case on that particular tract will be closed. However, if the City determines that a public nuisance still exists after repairs, the matter will be set down for hearing before this Court with notice to the property owner, to determine whether the repairs have satisfactorily been made to bring the subject tract above public nuisance standards.

IT IS, THEREFORE
ORDERED, ADJUDGED AND DECREED as follows:

1. That each of the subject tracts involved in this consolidated action are public nuisances.

2. That the Defendant, Charles S. Conley, must remove the public nuisance located on the following subject properties in accordance with the time table set by the Court with regard to each specific tract. If, after a hearing, with notice to the property owner, the Court determines that the subject tract has not been brought above public nuisance standards within the time table established by the Court, the city will be authorized to remove the nuisance structure from the property and the Defendant will be enjoined from maintaining said nuisance. The property owner, if he elects to repair the subject properties, is ordered to obtain a building permit for said repairs from the City of Montgomery and to give the City of Montgomery notice of completion of said repairs prior to the expiration of the time table set by the Court with regard to the subject tract.

3. The Court establishes the following time table for the repair of the subject properties or otherwise removal of the public nuisance conditions existing thereon.

a. Case No. 80-754 1612-14 Hardaway Street

Case No. 80-856 1606-08 Hardaway Street
Case No. 80-855 1600-02 Hardaway Street

The repairs necessary to bring the above properties above public nuisance standards must be completed within 45 days from the date of this Order.

b. Case No. 80-840 1400-02 Hardaway Street

The repairs necessary to bring the above property above public nuisance standards must be completed within 72 days from the date of this Order.

c. Case No. 80-841 1406-08 Hardaway Street

The repairs necessary to bring the above property above public nuisance standards must be completed within 90 days from the date of this Order.

d. Case No. 80-842 1412-14 Hardaway Street
Case No. 80-844 1418-20 Hardaway Street

The repairs necessary to bring the above properties above public nuisance standards must be completed within 120 days from the date of this Order.

e. Case No. 80-845 1430-32 Hardaway Street
Case No. 80-846 1436-38 Hardaway Street

The repairs necessary to bring the above properties above public nuisance standards must be completed within 150 days from the date of this Order.

f. Case No. 80-847 1442-44 Hardaway Street
Case No. 80-848 1500-02 Hardaway Street

The repairs necessary to bring the above properties above public nuisance standards must be completed within 180 days from the date of this Order.

g. Case No. 80-752 1506-08 Hardaway Street
Case No. 80-849 1518-20 Hardaway Street

The repairs necessary to bring the above properties above public nuisance standards must be completed within 210 days from the date of this Order.

h. Case No. 80-753 1512-14 Hardaway Street
Case No. 80-850 1424-26 Hardaway Street

The repairs necessary to bring the above properties above public nuisance standards must be completed within 240 days from the date of this Order.

i. Case No. 80-851 1530-32 Hardaway Street
Case No. 80-853 1536-38 Hardaway Street
Case No. 80-854 1542-44 Hardaway Street

The repairs necessary to bring the above properties above public nuisance standards must be completed within 270 days from the date of this Order.

4. That the Guardian Ad Litems in the above actions are entitled to a reasonable fee for their services rendered herein, however, the Court retains jurisdiction and reserves the setting of said fee for a later date.

5. That the Plaintiff is entitled to recover of the Defendants all costs incurred herein, including but not limited to abstract fees, attorneys' fees, Court costs, and the cost of removing said nuisance, if said nuisance is removed by the Plaintiff.

6. The Court retains jurisdiction for the enforcement of this Order and for the adjudication of all issues involved in these actions which have not been determined by this Decree.

DONE this the 27th day of March, 1981.

/s/ Sam W. Taylor
SAM W. TAYLOR circuit Judge

Richard Belser, Esq.
Charles Conley, Esq.
William Brittain, Esq.

IN THE CIRCUIT COURT FOR
MONTGOMERY COUNTY, ALABAMA

CITY OF MONTGOMERY, ALABAMA,
a Municipal Corporation,

Plaintiff,

vs.

PERSONS HEREIN NAMED, IF ANY,
AND CERTAIN LANDS,

Defendants.

DOCKET NO.

CV-80-751	CV-80-753
CV-80-840	CV-80-841
CV-80-842	CV-80-844
CV-80-845	CV-80-846
CV-80-847	CV-80-848
CV-80-849	CV-80-850
CV-80-851	CV-80-853
CV-80-854	CV-80-855
CV-80-856	CV-80-754
CV-80-752	

AMENDMENT TO ORDER

It appears to the Court that a clerical error and omission have resulted in the drafting of the Court's Order with regard to the above consolidated cases. The two errors are as follows:

1. Case No. 80-850 is listed in the original Order as 1424-26 Hardaway Street but should be listed as 1524-26 Hardaway Street.

2. Case No. 80-751 was erroneously omitted in the original Order. Case No. 80-751 is 1424-26 Hardaway Street. This property should be brought above public nuisance standards within 130 days from the date of this Order.

The original Order of this Court entered on the 27th day of March, 1981, is hereby vacated and the following Order is substituted therefor.

ORDER AS AMENDED

These actions having been consolidated by Order of this Court dated June 19, 1980 come before the Court upon the pleadings filed by the parties of record and upon evidence taken by the Court ore tenus sitting without a jury.

Guardian Ad Litems were appointed by the Court but were discharged when the record established that there were no unknown parties. A Special Master was appointed by the Court to perform an independent review and inspection of the subject properties and report to the Court; said report was received by the Court and all parties of record on or about November 17, 1980.

The Court having considered the above finds that is (sic) has jurisdiction of these actions and further finds that the Plaintiff is entitled to the following relief with regard to the specific properties involved herein:

FINDINGS OF FACT

The above actions were brought by the City of Montgomery, Alabama, a Municipal Corporation, to enjoin and abate public nuisances in accordance with Sections 6-5-122 and 11-47-117-118, Code of Alabama, 1975.

The Court finds that each of the subject properties remain, in varying degrees, public nuisances and further finds that the City of Montgomery, Alabama, a Municipal Corporation, has legal authority to enjoin and abate such public nuisances.

The Court finds from the evidence that the Plaintiff has pursued the abatement of the public nuisance condition of the subject properties for several years and more specifically has attempted to require the present property owner, Defendant Charles S. Conley, to remove or correct the public nuisance condition existing on each of the subject properties since 1978.

The Court finds from the evidence that the Plaintiff has made reasonable requests of the property owner, Conley, to remove the public nuisance conditions existing on the subject properties and has established reasonable time tables for the removal or correction of the public nuisance conditions existing thereon. The Court further finds, however, that the Defendant property owner, Conley, has failed, after notice, to comply with these time tables to bring the subject properties above public nuisance standards.

The Court finds from the evidence that the Plaintiff has not discriminated against either the subject properties or the owner of the subject properties in its application and enforcement of Sections 6-5-122 and 11-47-117 thru 118, Code of Alabama, 1975. While the evidence in these subject cases clearly demonstrate lack of discrimination by the Plaintiff, the Court, being familiar with numerous other proceedings, brought by the Plaintiff to abate public nuisances, takes judicial knowledge of the standard procedures employed by the Plaintiff and finds that these procedures were employed by the Plaintiff with regard to the subject

properties and as concerns the subject property owner.

The Court finds from the evidence that some minor repairs have been made by the property owner, Conley, on some of the subject structures since the report of the Special Master but that each of the subject properties remain below public nuisance standards. However, since some of the subject properties have been partially improved, it is the opinion of this Court that equity requires that the property owner be given the election of bringing the subject properties above public nuisance standards within a reasonable time table established by the Court or suffer the removal or razing of said structures by the Plaintiff.

The Court finds from the evidence that the standard procedures followed by the Plaintiff where a property owner elects to repair a structure which is a public nuisance is for the owner to obtain a building permit from the City, for the owner to notify the City upon completion of the repairs, and then for the City to conduct an inspection to verify whether the structure has been repaired above public nuisance standards. If the Defendant property owner elects to repair the subject structures within the time table set by the Court, the above procedures will be followed but, in addition, the Plaintiff will report its findings from final inspection to this Court.

If the City of Montgomery finds that the repairs have been satisfactorily completed to bring the property above public nuisance standards, the case on that particular tract will be closed. However, if the City determines that a public nuisance still exists after repairs, the matter will be set down for hearing before this Court with notice to the property owner, to determine whether the repairs have satisfactorily

been made to bring the subject tract above public nuisance standards.

IT IS , THEREFORE,
ORDERED, ADJUDGED AND DECREED as follows:

1. That each of the subject tracts involved in this consolidated action are public nuisances.

2. That the Defendant, Charles S. Conley, must remove the public nuisance located on the following subject properties in accordance with the time table set by the Court with regard to each specific tract. If, after a hearing, with notice to the property owner, the Court determines that the subject tract has not been brought above public nuisance standards within the time table established by the Court, the City will be authorized to remove the nuisance structure from the property and the Defendant will be enjoined from maintaining said nuisance. The property owner, if he elects to repair the subject properties, is ordered to obtain a building permit for said repairs from the City of Montgomery and to give the City of Montgomery notice of completion of said repairs prior to the expiration of the time table set by the Court with regard to the subject tract.

3. The Court establishes the following time table for the repair of the subject properties or otherwise removal of the public nuisance conditions existing thereon.

a. Case No. 80-754 — 1612-14 Hardaway Street
Case No. 80-856 — 1606-08 Hardaway Street
Case No. 80-855 — 1600-02 Hardaway Street

The repairs necessary to bring the above properties above public nuisance standards must be completed

within 45 days from the date of this Order.

b. Case No. 80-840 1400-02 Hardaway Street

The repairs necessary to bring the above property above public nuisance standards must be completed within 70 days from the date of this Order.

c. Case No. 80-841 1406-08 Hardaway Street

The repairs necessary to bring the above property above public nuisance standards must be completed within 85 days from the date of this Order.

d. Case No. 80-842 1412-14 Hardaway Street
Case No. 80-844 1418-20 Hardaway Street

The repairs necessary to bring the above properties above public nuisance standards must be completed within 90 days from the date of this Order.

e. Case No. 80-845 1430-32 Hardaway Street
Case No. 80-846 1436-38 Hardaway Street

The repairs necessary to bring the above properties above public nuisance standards must be completed within 115 days from the date of this Order.

f. Case No. 80-847 1442-44 Hardaway Street
Case No. 80-848 1500-02 Hardaway Street
Case No. 80-751 1424-26 Hardaway Street

The repairs necessary to bring the above properties above public nuisance standards must be completed within 130 days from the date of this Order.

g. Case No. 80-752 1506-08 Hardaway Street
Case No. 80-849 1518-20 Hardaway Street

The repairs necessary to bring the above properties above public nuisance standards must be completed within 145 days from the date of this Order.

h. Case No. 80-753 1512-14 Hardaway Street
Case No. 80-850 1524-26 Hardaway Street

The repairs necessary to bring the above properties above public nuisance standards must be completed within 160 days from the date of this Order.

i. Case No. 80-851 1530-32 Hardaway Street
Case No. 80-853 1536-38 Hardaway Street
Case No. 80-854 1542-44 Hardaway Street

The repairs necessary to bring the above properties above public nuisance standards must be completed within 175 days from the date of this Order.

4. That the Guardian Ad Litems in the above actions are entitled to a reasonable fee for their services rendered herein, however, the Court retains jurisdiction and reserves the setting of said fee for a later date.

5. That the Plaintiff is entitled to recover of the Defendants all costs incurred herein, including but not limited to abstract fees, attorneys' fees, Court costs, and the cost of removing said nuisance if said nuisance is removed by the Plaintiff.

6. The Court retains jurisdiction for the enforcement of this Order and for the adjudication of all issues involved in

these actions which have not been determined by this Decree.

DONE this 2nd day of April, 1981.

/s/ Sam W. Taylor
CIRCUIT JUDGE

Filed April 2, 1981
Pauline C. Eubanks
Circuit Clerk

APPENDIX B

October 27, 1981

THE STATE OF ALABAMA - - - JUDICIAL DEPARTMENT

IN THE SUPREME COURT OF ALABAMA

OCTOBER TERM, 1981-82

80-575
CHARLES S. CONLEY
V.
CITY OF MONTGOMERY, ALABAMA,
A Municipal Corporation

MONTGOMERY CIRCUIT COURT

ORDER

This Court on October 19, 1981, ordered the City of Montgomery to show cause in writing to be filed in the Office of the Clerk of this Court, within seven (7) days of that date, why the final judgments in *City of Montgomery v. Charles S. Conley and Certain Lands,* in cases CV 80-751 to 754 and CV 840 to 856, inclusive, in the Circuit Court of Montgomery County, Alabama, should not be stayed pending the appeal in this case. The City of Montgomery, on October 23, 1981, filed a response to the motion for the stay of execution. On examination thereof, this Court has concluded that the City of Montgomery has not satisfactorily shown to this Court why there should be a supersedeas bond in the amount of $125,000, and, further, the City of Montgomery has not shown to this Court why the judgments appealed from should not be stayed pending an

appeal in this case.

IT IS, THEREFORE, ORDERED that the judgments entered on April 2, 1981, in CV 80-751 to 754 and CV840 to 856 be, and they are hereby, stayed, without bond, pending the appeal and pending further orders of this Court.

IT IS FURTHER ORDERED that the Clerk of this Court shall serve a copy of this order, by sending a copy of same, by United States mail postage prepaid, to the Clerk of the City of Montgomery, to the Clerk of the Circuit Court of Montgomery County, and to Mr. Richard C. Belser, Attorney for the City of Montgomery, at their respective addresses.

Torbert, C. J., and Faulkner, Almon, Embry, and Adams, JJ., concur.

I J. O. Sentell, Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appears of record in said Court. Witness my hand this 28th day of Oct. 1981.

/s/ J. O. Sentell

THE STATE OF ALABAMA - - - JUDICIAL DEPARTMENT
THE SUPREME COURT OF ALABAMA

OCTOBER TERM, 1981-82

80-575

Charles S. Conley

V.

City of Montgomery, Alabama,
a Municipal Corporation

Appeal from Montgomery Circuit Court

BEATTY, JUSTICE.

The City of Montgomery, a municipal corporation, filed numerous actions against Charles S. Conley, owner of nineteen duplex housing units, seeking to enforce its uniform minimum housing code and to have each of the duplex units enjoined as a public nuisance. The actions, originally filed separately but consolidated for trial, were brought pursuant to Code of 1975, §§6-5-122, 11-47-117, -118, which provide that any municipality of this state may commence an action seeking to abate or enjoin any public nuisance injurious to the health, morals, comfort or welfare of the community or any portion thereof. After receiving evidence *ore tenus*, the trial court found that each of the units is a public nuisance and ordered defendant Conley to remove the nuisances by bringing the properties into compliance with the minimum housing code requirements within a reasonable timetable established by the court or suffer the removal or razing of the structures by plaintiff. All

costs, including but not limited to abstract fees, attorneys' fees, court costs and the cost of removing the nuisances if they are removed by plaintiff, were charged against defendant. Defendant appeals. We affirm.

Defendant contends that the order of the trial court was contrary to the great weight of the evidence. The order was based upon the following findings made by the trial court:

> "The Court finds that each of the subject properties remain, in varying degrees, public nuisances and further finds that the City of Montgomery, Alabama, a Municipal Corporation, has legal authority to enjoin and abate such public nuisances.
>
> "The Court finds from the evidence that the Plaintiff has pursued the abatement of the public nuisance condition of the subject properties for several years and more specifically has attempted to require the present property owner, Defendant Charles S. Conley, to remove or correct the public nuisance condition existing on each of the subject properties since 1978.
>
> "The Court finds from the evidence that the Plaintiff has made reasonable requests of the property owner, Conley, to remove the public nuisance conditions existing on the subject properties and has established reasonable timetables for the removal or correction of the public nuisance conditions existing thereon. The Court further finds, however, that the Defendant Property owner, Conley,

has failed, after notice, to comply with these timetables to bring the subject properties above public nuisance standards.

"The Court finds from the evidence that the Plaintiff has not discriminated against either the subject properties or the owner of the subject properties in its application and enforcement of Sections 6-5-122 and 11-47-117 thru -118, Code of Alabama, 1975. While the evidence in these subject cases clearly demonstrates lack of discrimination by the Plaintiff, the Court, being familiar with numerous other proceedings, brought by the Plaintiff to abate public nuisances, takes judicial knowledge of the standard procedures employed by the Plaintiff and finds that these procedures were employed by the Plaintiff with regard to the subject properties and as concerns the subject property owner."

When, as here, the trial court has heard testimony *ore tenus*, a presumption exists as to the correctness of its findings of fact. *Rush v. Atomic Electric Co.*, Ala., 384 So.2d 1067 (1980). We find that the trial court's judgment was amply supported by the evidence. The Director of the Housing Code Enforcement Division of the City of Montgomery, who conducted frequent inspections of the subject properties, testified that, in his opinion, the duplexes were "almost unfit for human habitation." The record also reveals that complaints were received by the city from tenants and neighbors, as well as from a member of the city council, about the condition of the duplexes.

Defendant claims that the order of the trial court reveals bias and prejudice against him by imposing an unreasonable timetable for the making of repairs as a condition to avoiding the destruction of his property. We respectfully disagree. The record discloses that defendant was aware, at the time he purchased the duplex units, that many of them did not comply with the minimum housing code requirements. Furthermore, defendant did not offer alternative time schedules for making the repairs. We held in *National Southern Products Corp. v. City of Tuscaloosa*, 246 Ala. 316, 20 So.2d 329 (1944), that the burden rests upon the property owner to bring forward matters showing that abatement of the public nuisance could be accomplished by less drastic means than requested by the municipality. Defendant here did not meet that burden.

Defendant raises other issues which he claims present constitutional questions. The record fails to disclose that such questions were presented to the court below; therefore, we cannot address them. *Cooper v. Green*, Ala., 359 So.2d 377 (1978). The judgment must be, and is, affirmed.

AFFIRMED.

Torbert, C. J., Maddox, Jones and Shores, JJ., concur.

I J. O. Sentell, Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appears of record in said Court.

Witness my hand this 23 day of April, 1982.

/s/ J. O. Sentell
Clerk, Supreme Court of Alabama

APPENDIX C

UNIFORM MINIMUM HOUSING CODE

OF THE

CITY OF MONTGOMERY, ALABAMA

ADOPTED December 6, 1963,
ORDINANCE NO. 49-63

Section 16: ENFORCEMENT

Section 16.1:

The standards heretofore set in this code shall be enforced by the Housing Code Director who is hereby authorized and directed to cause the Housing Code Inspector, the Health Officer, and the Building Inspector, the Gas, Fire, Plumbing, Electrical and the Sanitary Inspectors to assist, when necessary, in determining the conditions of dwellings, dwelling units, rooming units and premises located in the city of Montgomery, Alabama. For the purpose of making such inspections, the Housing Code Director or his representative is hereby authorized to enter, examine and survey at a reasonable time of day all dwellings, dwelling units, rooming units and premises.

The owner or occupant of every dwelling, dwelling unit, and rooming unit, or the person in charge thereof, shall give the Housing Director free access to such dwellings, dwelling unit or rooming unit and its premises, at all reasonable times for the purpose of such inspection, examination and survey. Every occupant of a dwelling or dwelling unit shall give the owner thereof, or his agent, or employee,

access to any part of such dwelling or dwelling unit or its premises at all reasonable times for the purpose of making such repairs or alterations as are necessary to effect compliance with the provisions of this code or with any lawful order issued pursuant to the provisions of this Code.

Office - Supreme Court, U.S.
FILED
NOV 23 1982
ALEXANDER L. STEVAS,
CLERK

NO. 82-685

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

CHARLES S. CONLEY,

Petitioner,

versus

CITY OF MONTGOMERY, ALABAMA
A MUNICIPAL CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

RICHARD C. BELSER
PHILIP H. BUTLER

OF COUNSEL:

Attorneys for Respondent

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NO. 82-685

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

CHARLES S. CONLEY,

Petitioner,

vs.

CITY OF MONTGOMERY,
ALABAMA, A MUNICIPAL CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

RESPONDENT'S BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI

QUESTIONS PRESENTED

I

Whether the Petitioner properly and adequately presented federal constitutional issues for the trial Court to rule upon?

II

Does the record of the subject in rem proceeding to abate public nuisance reveal deprivation of the Petitioner's federally protected rights?

STATEMENT OF THE CASE

The litigation which is the subject of this Petition for Writ of Certiorari is comprised of actions filed in the Circuit Court of Montgomery County, Alabama, in rem, by the City of Montgomery, Alabama, a Municipal Corporation, against 19 duplex housing units, all located within the City Limits of Montgomery. These causes of action were originally filed separately against each duplex but were later consolidated for trial upon motion of the petitioner-property owner without objection of the City of Montgomery

A Motion to Dismiss these actions was filed by the petitioner-property owner, which was subsequently overruled. The petitioner-property owner then filed an Answer denying that the subject units constituted public nuisance and denying the allegations of the complaints in rem. Neither the Motion to Dismiss nor the Answer filed by the petitioner-property owner raised Federal Constitutional claims.

Trial of the subject actions were set in the Fifteenth Judicial Circuit of Alabama, and Appellant filed a Motion for Continuance of trial, which was denied. Upon such denial, the Appellant petitioned for certiorari before the Alabama Supreme Court seeking an Order directing the Trial Court to grant the continuance. The Petition for Certiorari was denied by the Alabama Supreme Court.

Trial was held on the merits of these consolidated actions with the Court sitting non-jury. Evidence was received ore tenus and after receipt of such evidence, the Trial Court issued its Order finding that each of

the subject duplexes were public nuisances and that each were in violation of the minimum housing code requirements of the City of Montgomery, Alabama.

The Trial Court thereupon ordered the Appellant to bring his property within compliance of the minimum housing code requirements of the City of Montgomery, Alabama, and set timetables to accomplish the same.

The petitioner-property owner appealed the Order of the Trial Court and the Order was subsequently affirmed by the Alabama Supreme Court on the 23rd day of April, 1982. Application for Rehearing was timely filed and was denied by the Alabama Supreme Court.

From the overruling of the Application for Rehearing, the petitioner-property owner filed this Petition for Writ of Certiorari.

STATEMENT OF THE FACTS

The City of Montgomery, Alabama, after receiving numerous complaints concerning the subject properties from tenants, neighbors and City Councilmen, initiated efforts to remedy public nuisance conditions created by the subject properties (R. 214). These efforts initially involved contacting the owner of the property by letter informing the owner of specific defects and areas wherein the structures did not comply with the uniform minimum housing code of the City. After receipt of these letters, the owner at such time, William Compton, made certain repairs in accord with an agreement for repairs with the Enforcement Division of the Housing Code Department (R. 312).

The subject units were purchased by the Appellant on March 31, 1977 (R. 506). At the time of the sale to the Appellant, the seller advised the Appellant that some of the duplex units were under an agreement with the City of Montgomery to be brought up to minimum housing code standards (R. 373). The seller gave the Appellant a list of the units which did not comply with the uniform minimum housing code standards as of the date of the sale (R. 386). The Housing Code Department of the City contacted the Appellant subsequent to his purchase of the subject units and requested that the Appellant bring the units into compliance with the uniform minimum housing code standards. The Appellant advised the Director of the Housing Code Enforcement Division that he was not going to repair the duplexes (R. 258).

Having failed to persuade the Appellant to bring

the 19 duplexes up to minimum housing code standards, the City filed an action in the Circuit Court of Montgomery County as to each of the units seeking to enforce its uniform minimum housing code standards and to have the subject units declared public nuisances.

At trial of these consolidated cases, the Director of the Enforcement Division of the Housing Code Department testified that all of the 19 duplex units were unfit for human habitation (R. 231) and, further, that none of the units were in compliance with the uniform minimum housing code standards of the City of Montgomery (R. 317, 321, 322, 324, 326, 328, 329, 331, 332, 334, 337, 338-39, 341, 343, 344-45, 349, 350 and 352). The areas in which the units did not comply with the uniform minimum housing code standards were specifically provided to the Appellant nearly two years before these actions were filed (R. 192-193). Photographs were introduced into evidence as Plaintiff's Exhibits (1, 2, 3, 4, 7, 8, 10, 11, 13, 14, 16, 17, 19, 21, 23, 25, 27, 29, 37, 38, 40, 41, 43, 44, 46, 47 and 49) which demonstrated the condition of the subject duplex units.

At the close of all of the evidence, the Trial Court found that the City of Montgomery was entitled to enforce its uniform minimum housing code standards as to the 19 subject duplexes and found that each of said units were a public nuisance. The Court established a timetable which allowed the Appellant the alternative of systematic compliance with the uniform minimum housing code within reasonable periods of time or suffer the units to be razed.

REASONS FOR DENYING THE WRIT

I

THE UNITED STATES SUPREME COURT LACKS JURISDICTION TO REVIEW BY WRIT OF CERTIORARI IN THAT NO FEDERAL CONSTITUTIONAL QUESTION WAS PRESENTED OR DECIDED BELOW.

Petitioner apparently bases his request for Writ of Certiorari upon Rule 19 1. (a) of Supreme Court Rules:

> 1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:
>
> (a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court."

The record of the trial of this cause fails to reveal any instance of Petitioner even attempting to litigate Federal Constitutional issues. The only reference to the United States Constitution or Amendments thereto are those broad statements of Petitioner quoted on Pages 11-12 of his Brief in support of this Petition.

It is obvious, even without review of the record, that these "statements" by Petitioner were simply argument in support of his Motions for Continuance and to Dismiss. At no point in the proceeding did the Petitioner in his pleadings attempt to bring Federal Constitutional issues before the Trial Court. Neither were there objections raised by the Petitioner in an attempt to preserve any Federal Constitutional issues.

The Alabama Supreme Court in affirming the Order of the Trial Court noted that the Defendant, on appeal, raised issues claiming Constitutional questions but correctly found that the record failed to show issues were presented to the Court below. Therefore, because of the Defendant failing to litigate the issue at trial, he could not litigate such issues for the first time on appeal. *Cooper v. Green,* Ala. 359 So.2d 377 (1978).

In 1973, the State of Alabama adopted (with few exceptions) the Federal Rules of Civil Procedure providing for notice pleading and for liberal allowance of Amendments to pleadings. However, the pleadings in the instant case are totally void of any reference to Federal Constitutional issues and are equally void as to any attempt to include such issues by Amendment. Petitioner never claimed in his pleadings that his Federal Constitutional rights were being infringed upon by the City of Montgomery, Alabama, in its attempt to enforce its uniform minimum standard housing code against his rental duplexes.

Respondent submits that Petitioner's broad accusation of some obscure conspiracy and his oral satement to the Trial Court that in his "opinion" the City

violated Federal and State Constitutional rights, without more, is insufficient to present a Federal claim upon which the Trial Court could be expected to rule. As previously mentioned, these statements by the Petitioner were by way of argument in support of his Motions for Continuance and to Dismiss and certainly did not give the City of Montgomery fair and reasonable notice that it was called upon to defend Federal Constitutional claims.

In addressing jurisdiction by certiorari to review a State civil case, this Court in *Webb v. Webb*, 451 U.S. 493, 68 L.Ed.2d 392, 395-396, 101 S.Ct. 1889 (1981) held:

> ". . . It has become clear, however, that the federal question was not raised below and that we are without jurisdiction in this case. We must, therefore, dismiss without reaching the merits."

It is well-established that the jurisdiction of the United State Supreme Court to reexamine a final judgment of a State Court can only exist if the federal claim was adequately presented in the State Trial Court. *New York, ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 73 L.Ed. 184, 49 S.Ct. 61, 62 A.L.R. 785 (1928); *Oxley Stave Co. v. Butler County*, 166 U.S. 648, 41 L.Ed. 1149, 17 S.Ct. 709 (1897).

The instant consolidated actions were filed by the City of Montgomery, Alabama, a Municipal Corporation, in rem, to enforce its minimum standard housing code against certain duplex structures which happened to be owned by the Petitioner. If Petitioner claimed

that the City of Montgomery could not enforce its housing code against his properties due to alleged Federal Constitutional violations, then clearly such defense would be required to be pled in his Answer. *City of Prichard v. Moulton,* 277 Ala. 231, 168 So.2d 602 (1964). Such defense against enforcement would be by way of confession and avoidance and clearly such special defense would have to be pled in order to give the plaintiff notice of the special defense. ARCP 8(c).

Nevertheless, the Petitioner now complains that the Supreme Court of Alabama committed error by failing to rule upon his "Federal Constitutional Claim". In *Webb v. Webb,* supra, this Court stated:

> ". . . This Court has frequently stated that when 'the highest State Court has failed to pass upon a Federal question, it will be assumed that the omission was due to want of proper presentation in the State Courts, unless the aggrieved party in this Court can affirmatively show to the contrary. *Street v. New York,* 394 U.S. 576, 22 L.Ed.2d 572, 89 S.Ct. 1354 (1969) . . ." 68 L.Ed.2d, at 396."

Not only is the Petitioner unable to affirmatively show wrongful omission on the part of the Alabama Supreme Court to pass upon the Federal claim but rather the opinion of the Alabama Supreme Court clearly states that it could not review the Federal Constitutional claims because they were not properly presented at trial.

II

THE FEDERAL CONSTITUTIONAL CLAIMS NOW RAISED BY THE PETITIONER ARE WITHOUT MERIT.

The record at trial of this cause clearly shows that the Petitioner's belated Federal Constitutional claims are totally without merit. Petitioner maintains that the City of Montgomery, Alabama, took a substantially different attitude toward the subject properties after he purchased them. However, the record clearly shows that the previous owners of the property had cooperated substantially more with the Housing Code Department of the City of Montgomery than did the Petitioner in working toward compliance with the minimum standard housing code. (R. 312, 316).

The above claim by the Petitioner was specifically addressed by the Alabama Supreme Court as follows:

> "Defendant claims that the Order of the Trial Court reveals bias and prejudice against him by imposing an unreasonable timetable for the making of repairs as a condition to avoiding the destruction of his property. We respectfully disagree. The record discloses that the defendant was aware, at the time he purchased the duplex units, that many of them did not comply with the minimum housing code requirements. Furthermore, defendant did not offer alternative time schedules for making the repairs. We held in *National Southern Products Corp. v. City of Tuscaloosa,* 246 Ala. 316, 20 So.2d 329,

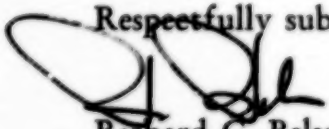
> (1944), that the burden rests upon the property owner to bring forward matters showing that the abatement of the public nuisance could be accomplished by less drastic means than requested by the municipality. Defendant here did not meet that burden." 16 A.B.R. 1495; p. A-21, Petitioner's Brief in Support of Certiorari.

Petitioner's reference on Page 15 of his Brief in Support of Certiorari attempts to interject a novel and unrelated issue on whether he was given proper notice concerning weed cutting on his subject properties. The record will show that references to high weeds were properly objected to at trial by the Petitioner and the Trial Court sustained the objection. The subject action did not involve existence of weeds but rather involved the enforcement of the City's minimum housing code standards against the duplex structures and the abatement of public nuisance existing due to such non-compliance. The reference to lack of notice about weed cutting had nothing to do with the subject case at trial and clearly has nothing to do with the appeal or this Petition for Writ of Certiorari.

CONCLUSION

Due to the above and foregoing reasons, the Petition for Writ of Certiorari in the instant case is due to be denied.

Respectfully submitted,



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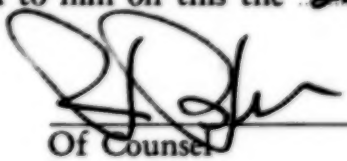
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have served a copy of the foregoing Brief in Opposition to Writ of Certiorari upon Charles S. Conley, Esquire, Petitioner and Attorney for Petitioner, 315 S. Bainbridge Street, Montgomery, Alabama 36104 by depositing same in the United States mail, first-class postage prepaid and properly addressed to him on this the 22nd day of November, 1982.



Of Counsel